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IN THE

Supreme Court of the United States

October Term, 1951.

No. 492.

MARIKO KUNIYUKI,

Petitioner.

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

REPLY MEMORANDUM OF PETITIONER.

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REPLY MEMORANDUM OF PETITIONER.

Petitioner respectfully requests leave to file this Reply Memorandum to the Brief for the United States in Opposition to the Petition for Writ of Certiorari.

I.

The Respondent Is in Error in Its Claim That There Were No Factual Issues to Be Determined by the Trial Court and That Therefore the Court of Appeals Could Disregard the Trial Court's Findings Thereon.

The very language used by Respondent, to bolster his point that there was no duress, conclusively shows that there was a conflict which the trial court, who observed the witness on the stand, resolved in favor of Petitioner and against Respondent. Thus Respondent says (Br. in Opp., pp. 15 and 16]: "Petitioner considered herself

sufficiently Japanese to assume that propaganda encouraging the Japanese to vote applied to her." But the court found the facts to be just to the contrary. For example, the court found *not* that the propaganda encouraged the "Japanese" to vote, but that the propaganda of the United States Occupation Forces in Japan and of the Headquarters of General Douglas MacArthur urged *"all* persons, *particularly all women,* in Japan to vote." (Italics added.) [R. 30.] This finding is amply supported by the evidence and the Respondent makes no contention that it is not. [See R. 70, 75, 90, 93; Pltf. Ex. 2, p. 25; Pltf. Ex. 5, pp. 4-11; Pltf. Ex. 6.]

Respondent next states (Br. in Opp. p. 16): "There is no contention that the propaganda was directed to the Japanese Nisei." But in so stating Respondent slides past the issue which is *not* whether General McArthur and his headquarters *intended* the propoganda for the Nisei, but whether the propaganda was *understood* by them as applying to them. On this issue, as indicated above, the court found that the Occupation Forces' propaganda was interpreted as applying to *all* persons in Japan [R. 30] and was so understood by petitioner. [R. 30.] These findings are also amply supported by the evidence and were found contrary to Respondent's interpretation. See record references just given above. Furthermore, our occupation forces in Japan soon recognized what the effect of their propaganda on the Nisei voting had been and issued a belated press release calling attention to the fact that Nisei had voted and advising them that they should not so do in the future, lest perhaps they lose their United States citizenship. (See Appendix A to Petition, and unclassified State Department document dated May 5, 1950, and Enclosures 1 and 2 thereto, lodged with the court

below and with this court and referred to by Petitioner in the same manner that Respondent refers to other documents so lodged (Br. in Opp. p. 11), Pet. p. 15, note 4.)

And finally, Respondents' assertion as a fact (Br. in Opp. p. 16) that "no one who did not have a sense of being tied to Japan would regard the releases and comments about the assertion of Japanese rights as applying to his situation" is directly contrary to the facts as found by the trier of fact, which finding is also amply supported by the evidence. In the first place, the occupation forces themselves recognized that the effect of their propaganda was causing Nisei who did not want to forfeit their citizenship to vote (*ibid*). Further, the Court found as follows *after having seen and heard the witness:*

> "In so voting, the plaintiff in good faith believed that she was helping the United States and helping to achieve United States objectives in Japan, by helping to democratize Japan." [R. 30, 31.]
>
> ". . . the plaintiff in so voting had no intention to, or desire to affect her allegiance to the United States, or to shift her allegiance from the United States to Japan." [R. 31.]

The evidence amply supports the *"American,"* not Japanese conduct of Plaintiff-Petitioner. Thus, she testified, and the court (as does Respondent) obviously believed her:

> ". . . It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote." [R. 70.]

Plaintiff testified that her desire to return "to my home in Seattle" [R. 74], was not permitted fruition because "Japan was controlled by militarists. Thus, I was detained in Japan throughout the war." [R. 74.] Further, that she voted "with a view toward exercising my ideas with respect to democratic practices." [R. 75.]

It further appeared in the evidence which the trial court heard, and which the court below did not, that plaintiff made it clear to her employer in Japan that she was and claimed her United States citizenship. [R. 89.] And when asked whether, when she voted "you did so as a Japanese citizen, did you not" [R. 93], she replied: "My parents were in America and I have American citizenship but, according to General MacArthnur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote." [R. 93.] Later: "At that time, I believed I was an American citizen, but I was living in Japan, at that time, so I voted" [R. 94.], and "my intention of voting at that time was *to help the occupation forces.*" [R. 95.] (Italics added.)

When asked whether she knew "that the occupational forces represented eleven nations" [R. 95], she replied: "I thought it was only America." [R. 95.] This is not surprising; it cannot be expected that petitioner, any more than the average person in Japan, would know of the technical nature of General MacArthur's dual capacity, in one of which he represented *only* the United States. (*Selected Data on the Occupation of Japan*, pp. 1, 131, lodged with this court, Pet. p. 15, note 4.) To petitioner, General MacArthur was an American General in the uniform of the United States Army. To her, and to the people in Japan, he stood for America. And so when Plaintiff was asked as to her understanding of who General Mac-

Arthur was, she logically replied: "I believe he is the person as brought peace in Japan" and that "He represents President Truman." [R. 98.]

Thus it appears that in the light of this evidence (and there is no dispute or contradiction about it) the trial court who—again we repeat—heard and saw the live testimony and observed the witness on the stand—was amply supported in his findings and that indeed, unless he disbelieved her, there could be no other finding.

It is submitted, therefore, that Respondent's assertion that the trial court's finding of involuntariness did not involve the resolution of any disputed question of fact is incorrect, if for no other reason than Respondent himself draws different inferences of fact contrary to those drawn by the trial judge.

A. Inferences to Be Drawn From Undisputed Facts Are Still for the Trial, and Not the Appellate, Court and Do Not Constitute Legal Conclusions.

The trial judge here did the very thing this court ordered the trial judge to do in *Acheson v. Okimura,* No. 421, Oct. Term 1951, and *Acheson v. Murata,* No. 422, Oct. Term 1951. There this court remanded the cases to the trial judge "for specific findings as to the circumstances attending appellee's service in the Japanese Army (and voting in the Japanese elections) and *the reasonable inferences to be drawn therefrom.*" (Italics added.) That is precisely the thing the trial court did in the case at bar. He found in elaborate findings [R. 31-43] the circumstances surrounding petitioner's voting in the Japanese elections, that the occupation forces were all powerful and all encom-

passing and completely dominated the minds of the people in Japan.[1] From these findings, he reasonably inferred that the mind of appellee was not free and unimpaired but rather that the inducement and encouragement from the occupation forces were such as to be incapable of resistance and therefore her act was not free and voluntary. [R. 31.] As this court must have felt when it remanded the *Okimura* and *Murata* cases, it is the trial judge who is peculiarly in a position to ascertain the circumstances and to draw the inferences therefrom on the basis of *all* the evidence before him. Instead, in the case at bar, though the trial court did that very thing, the Court of Appeals usurped the function of the trial judge and sat as the trier of fact itself.

Assuming, *arguendo,* with respondent, that "the District Court's finding that petitioner's act was involuntary did not involve the resolution of any disputed question of fact" (Br. in Opp. 17) because based on "petitioner's testimony and the documentary exhibits" (*ibid.*), nevertheless the inferences to be drawn from the undisputed facts are for the trial, and not the appellate, court. (*Gunning v. Cooley,* 281 U. S. 90, 94.) This principle from the *Gunning* case was succinctly stated recently by the Court of Appeals for the Eighth Circuit in *United States v. Beatty,* 192 F. 2d 945, 948 (C. A. 8, 1951):

> "It must also be remembered that when different *inferences* reasonably and honestly may be drawn *from undisputed facts,* it is for the trial court, and not this Court, to decide what inference shall be drawn." (Italics added.) (Citing the *Gunning* case.)

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[1]Record and other references to support these findings are set forth in the Petition at pages 21-22, 25-26, 28-30.

Thus here, while the facts before the trial court were undisputed, the inferences to be drawn therefrom were not. Respondent's contrary inferences demonstrate this. Accordingly, the trial court's inferences must remain. The Court below violated this principle.[2]

II.

The Constitutional Issue Is Still Before This Court.

The action of this court in remanding the *Okimura* and *Murata* cases did not dispose of the constitutional issues. Indeed, if this court should, and we submit it should not, go along with the lower court on the factual issue, the constitutional issues are then clearly ripe for

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[2]Indeed, the error of Respondent's theory, that, because the only evidence was that of the Plaintiff's oral testimony plus the documentary exhibits, the inferences and findings of fact therefrom become only conclusions of law, is highlighted by the fact that not only were the cases cited in the Petition at footnote 1, page 4, decided on just such evidence, but also by the fact that since the filing of the Petition at least 13 more cases were decided, *all in favor of plaintiff*, on just such evidence. What Respondent's theory amounts to, therefore, is that the appellate court and not the trial court becomes the trier of fact. Such a state of affairs is, of course, just not the law. The cases referred to (all in the District Court for the Southern District of California; none reported) are: *Takeshita v. Acheson*, No. 10302(a); *Hamada v. Acheson*, No. 10095(c); *Kageyama v. Acheson*, No. 10095(d); *Kobayashi v. Acheson*, No. 10527(b); *Sato v. Acheson*, No. 9548; *Tanaka v. Acheson*, No. 11666; *Sasano v. Acheson*, No. 11864; *Yamada v. Acheson*, No. 12925; *Sameshima v. Acheson*, No. 13054; *Fujiwara v. Acheson*, No. 13148; *Nakagawa v. Acheson*, No. 12651; *Nakamura v. Acheson*, No. 13354; *Kambara v. Acheson*, No. 13019.

In each of these cases the court found that the plaintiff had acted involuntarily when he voted. This, the trial court found as a fact. Under respondent's view, simply because the only witness was the plaintiff, with the balance of the evidence in the form of documents, the trial court's findings and inferences are to go for naught and the appellate court is to substitute its own judgment *de novo* from the cold record. In effect, what respondent urges is that in these cases the trial courts be put out of business.

decision. If for no other reason than to resolve so important a point involving so many persons and because of the large public concern (see Pet. p. 10), the petition for the writ should be granted. The conflict presented by the decisions of the trial court in *Okimura* and *Murata* and that of the lower court are still present and can only be resolved by this court.

III.

The Questions of Foreign State and Political Elections.

The countervailing arguments of Respondent in his brief and the conflicting decisions of the many courts which have passed on the point in addition to the court below (see Pet. p. 4) only serve to emphasize the necessity for this court to grant the writ to settle so important a point.

IV.

Respondent Did Not Meet the Issue as to Whether 8 U. S. C. 801(e) Should Be so Interpreted as to Expatriate an American Citizen Who Voted Under the Circumstances Here Prevailing.

In ignoring this issue Respondent has refused to face the fact that these elections were ordered by *us*, the United States, and that *we* were the ones who put out the election propaganda and employed, laudibly of course, every means at our command to *get people to vote*. Respondent does not deny this, for he cannot and, indeed, should not, for our motives and conduct were of the highest. But the fact remains, that Respondent though not arguing directly to the point, is urging a construction of the statute clearly and cruelly harsh and one which is not necessary to carry out the purpose which Congress had in mind when it passed

the statute. The very legislative history quoted by Respondent (Br. in Opp. pp. 14 and 15), as well as that quoted by Petitioner (Pet., pp. 38-40), demonstrates that Congress did *not* have this situation in mind. Congress was concerned about a political and practical allegiance to a foreign country, not a vote cast *because* of allegiance to *this* country.

The importance of the resolution of this question calls for the granting of the petition.

Moreover, since the filing of the petition herein, this court has, on February 4, 1952, granted certiorari in *Kawakita v. United States,* No. 220, Misc., Oct Term, 1951. As pointed out in the petition (p. 7), the *Kawakita* case involves a situation where the government argued no loss of citizenship despite an intent to expatriate, while the lower court in the case at bar, pursuant to argument by the *same* government, held that there was loss of citizenship despite an intent not to expatriate. The lower court in each case was the same.

The resolution of this confusion and conflict calls for hearing by this court.

Conclusion.

Petitioner submits, the grave and important public questions presented in this case aside—and it is apprehended that Respondent will agree with her in this—for Petitioner to lose her precious right of United States citizenship under her circumstances and the circumstances of this case would be unfair and a manifest injustice. Her father and mother live in this country [R. 51]; she wants to come home and live with them [R. 74] as a United States citizen [R. 60] and to contribute to the well being of this

land. Her heart is with America. After the war she served the occupation forces as best as she knew how. [R. 60.] Her brother served this country for four years in the Army of the United States [R. 51], serving for two years in the European Theater. [R. 52.] If it be considered, contrary to the findings of the trial court, that the overawing conditions and their effect upon petitioner were such as not to have rendered her acts involuntary, then it must be recognized that she acted only because of a desire to do what this country wanted her to do. Certainly there was mistake and confusion. Citizenship may not be taken away under such a state of affairs. (*Cf., Perkins v. Elg,* 307 U. S. 325, 337.)

Involuntary expatriation under such circumstances simply does not comport with our concepts of justice.

The petition should be granted.[3]

Respectfully submitted,

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[3]The petition for writ of certiorari before judgment in the case of *Furusho v. Acheson,* No. ....., Oct. Term, 1951, already filed or to be filed, presents issues identical with those present here and illustrates the necessity for this court to consider the problems involved.